United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-131

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of John D'Amelio, Contempt Proceeding Under Title 28, United States Code, Section 1826a.

UNITED STATES,

Plaintiff-Appellee,

- against -

JOHN D'AMELIO,

Defendant-Appellant.

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BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

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In the Matter of John D'Amelio, Contempt Proceeding Under Title 28, United States Code, Section 1826a.

76-1313

UNITED STATES,

Plaintiff-Appellee,

- against -

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BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dated June 29, 1976, which found that John D'Amelio refused unlawfully to testify before June 8, 1976 Regular Grand Jury after having been granted immunity pursuant to an order of the Honorable Whitman Knapp, United States District Judge dated June 29, 1976, and ordering said John D'Amelio confined at Metropolitan Correctional Center until the expiration of said Grand Jury, but not longer than eighteen months. Appellant is presently serving his sentence.

STATEMENT OF FACTS

On November 1, 1973, John D'Amelio was arrested for

conspiring to violate the Federal Narcotic Laws. He was held overnight at West Street and released the next morning at the United States Attorney's office at Foley Square without any charges being preferred against him.

In October of 1975 John D'Amelio was indicted for conspiring to violate the narcotic laws and three substantive counts involving the distribution and possession of cocaine. The duration of the conspiracy was from September 1, 1973 to the date of the indictment.

The fourth count of the indictment and the third and fourth overt acts charged in the first count of the indictment encompass the incident of November 1, 1973, the incident for which the defendant was arrested and released.

The indictment was tried before the Honorable Inzer B. Wyatt and a jury. The Court dismissed counts two and three after the Government's case. The jury acquitted John D'Amelio of the remaining counts on Friday, April 9, 1976. Before the jury left the courtroom, the Assistant United States Attorney wrote out and handed a subpoena to John D'Amelio in the courtroom. Said subpoena is the subpoena pursuant to which John D'Amelio appeared before the Grand Jury on June 29, 1976.

An order to show cause to quash said subpoena was heard before the Honorable Charles Briant. The Court denied said motion, stating that it was premature since the questions before said Grand Jury had not yet been asked.

On June 29, 1976 John D'Amelio appeared before said Grand Jury and invoked his fifth amendment privilege. An order granting the witness immunity was signed by the Honorable Whitman Knapp and the witness was advised that he had immunity and he still refused to testify.

He was then brought before the Honorable Whitman Knapp without notice and John D'Amelio was summarily held in civil contempt.

ARGUMENT

POINT I

THE DEFENDANT WAS ENTITLED TO NOTICE PRIOR TO THE CONTEMPT HEARING

If the Government moved to hold the appellant in criminal contempt pursuant to Rule 42, Federal Rules of Criminal Procedure, the appellant would have been entitled to reasonable notice and a reasonable time to prepare a defense. The Government contends that no notice is required under Title 28, United States Code, Section 1826a.

It seems ludicrous that whether or not notice is required in a contempt hearing depends on which section of the law the prosecutor moves. Two circuits have held that notice is required under 28 U.S.C. 1826a. See United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Boe, 491 F.2d 970 (8th Cir. 1974). Both Courts said the reasoning requiring notice in Harris v. United States, 382 U.S. 162 (1965) applies to 28 U.S.C. 1826a.

POINT II

DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED AFTER HE WAS QUESTIONED ABOUT MATTERS RELATING TO THE INDICTMENT OF WHICH HE WAS ACQUITTED

The Assistant United States Attorney stated before the Honorable Whitman Knapp that they want to know where Mr. D'Amelio got the cocaine which he was acquitted of selling to one William Zacchi. See p. 11 of the transcript.

It is undisputed that if a man is convicted of a crime, given immunity and asked about details of the crime for which he was convicted, he must testify or be held in contempt. Piemonte v. United States, 367 U.S. 556. There is only one reported case in which a person was acquitted and later questioned before a grand jury. See United States v. Castaldi, 338 F.2d 883 (2d Cir. 1964), rev'd 384 U.S. 886. However, Castaldi is distinguishable in that Castaldi had been acquitted one year before the grand jury investigation and the grand jury investigation was not about the specific facts of the acquittal, but about narcotics traffic in general. Here, in the instant case, defendant is asked the source of the narcotics for which he was acquitted of selling.

He is to be in a dilemma if he answers and denies he had narcotics. The Government might indict him for perjury and defendant would have to raise the defense of collateral estoppel and double jeopardy, or he can refuse to testify and face contempt charges. This

treatment of a defendant is very close to double jeopardy and collateral estoppel, which violate the due process clause of the United States Constitution and constitute cruel and inhuman punishment of the appellant.

POINT III

THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS OVER THE DISTRICT COURT AND UNITED STATES ATTORNEY'S OFFICE TO RECTIFY THE ABUSE THAT IS MANIFESTED IN THIS CASE

As stated in the facts, defendant was originally arrested in the fall of 1973, released after being held overnight and then indicted some two years later. Within seconds of the defendant's acquittal of said indictment, he was served with a subpoena to further litigate the said indictment. There must be at one point an end to litigation in a criminal case. An acquittal should be such an end. I quote Judge Warren's dissent in Piemonte, supra, where he was complaining about a man subpoenaed after conviction, 367 U.S. at 564:

> In my opinion, the Government has subjected the petitioner to unjustifiable harassment. The petitioner has been convicted for his admittedly illegal conduct and is presently paying his debt to society for that conduct. However, not being satisfied with this punishment, the Government sought to extract from the petitioner, under the threat of a contempt conviction, testimony which it

> could not have compelled at the original trial in 1958, and which it knows might well endanger petitioner's life and the lives of his loved ones. In my view, the Government's attempt to compel the petitioner to testify about conduct for which he has already been punished, and the District Court's imposition of an additional term in the penitentiary for petitioner's refusal to testify about such conduct represents the type of harassment which violates the spirit of the Double Jeopardy Clause of the Fifth Amendment. Cf. Abbate v. United States, 359 U.S. 187, 196 (separate opinion of MR. JUSTICE BRENNAN); Ciucci v. Illinois, 356 U.S. 571, 573 (dissenting opinion). I think it can fairly be said that the treatment which the petitioner has received from the Government and the District Court falls far short of that fundamental fairness which the Constitution guarantees and to which even the basest prisoner in the penitentiary is entitled. Therefore, even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower federal courts to rectify the abuse of the summary contempt power which the record in this case makes manifest. See Offutt v. United States, 348 U.S. 11.

If the Court approves this conduct, it would allow the Government in every acquittal in this district to subpoena the defendant and question about various aspects of the case. There would be no end to litigation arising out of this procedure.

It is apparent the reason that there was no prior recorded decisions exactly on point is that the Government has previously thought better of harassing citizens to the extent that has been done

in the record at bar.

CONCLUSION

The decision of the District Court should be reversed and the defendant released.

Respectfully submitted,

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